Filed 1/15/13 P. v. Gutierrez CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RUBEN GUTIERREZ, Defendant and Appellant.	2d Crim. No. B239260 (Super. Ct. No. LA069678) (Los Angeles County)

Ruben Gutierrez appeals a judgment of conviction entered after he pleaded no contest to possession of a controlled substance. (Health & Saf. Code, § 11377.) He contends the trial court erred in denying his motion to suppress evidence obtained in a search of his vehicle. (Pen. Code, § 1538.5, subd. (i).) We affirm.

FACTS AND PROCEDURAL HISTORY

During a mid-afternoon patrol in a high narcotics area, Los Angeles Police Officer Alejandro Higareda and his partner Officer Gomez saw a vehicle driving towards them in the wrong direction. Gutierrez was driving the vehicle which had crossed into the traffic lane for oncoming traffic. When Gutierrez saw the police patrol car, he swerved back into the correct traffic lane. The police officers made a U-turn and pursued Gutierrez for driving in the wrong direction in violation of Vehicle Code section 21657. The officers activated the lights and siren on their patrol car.

Gutierrez slowed down but did not stop. There was no traffic on the street and many opportunities to pull over safely, but Gutierrez continued to drive slowly for five to ten seconds. Officer Higareda saw Gutierrez lean over and reach down to the floor of his vehicle, making approximately three up and down movements. Eventually, Gutierrez pulled over and stopped. Higareda got out of the patrol car and saw Gutierrez leaning over to the passenger side floor of his vehicle. Higareda yelled for Gutierrez to get out of the car three to five times before Gutierrez obeyed the order. Higareda believed Gutierrez may have been trying to conceal contraband or a weapon.

Shortly after he got out of his vehicle, Gutierrez was handcuffed. The passenger promptly obeyed all commands made by the officers.

Officer Higareda walked towards the car and observed a "crazy glue" container in plain view stuffed between the driver's seat and center console. Based on his experience as a police officer, Higareda knew that glue containers were commonly used to conceal narcotics, and had personally seen such containers used for that purpose approximately 20 times. Higareda picked up the glue container, opened it, and found 19 pills in it. Higareda also saw a brown leather bag on the passenger side floor. Higareda unzipped the bag and found a substance resembling methamphetamine inside it. There was also $40 in cash in the leather bag. Higareda also saw a puppy in the back but none of the movements by Gutierrez involved turning towards the back seat.

Gutierrez was initially charged with possession of a controlled substance for sale (Health & Saf. Code, § 11378), and sale or offer to sell a controlled substance. (*Id*. at § 11379, subd. (a).) At his preliminary hearing, Gutierrez moved to suppress evidence of any drugs found in his possession based on an allegedly illegal search of the glue container and leather bag. The motion was denied. After the hearing, the trial court dismissed the possession for sale charge and a possession of a controlled substance charge was added. (*Id*. at § 11377.) Gutierrez renewed his motion to suppress and, after its denial, pleaded no contest to possession of a controlled substance. He was sentenced to the upper term of three years. Sentence was stayed and he was placed on formal probation for three years.

DISCUSSION

Gutierrez claims the warrantless search of his vehicle was conducted without probable cause in violation of his constitutional rights under the Fourth Amendment. He argues that he did not have access to the vehicle at the time of the search, the search was not conducted to obtain evidence related to his traffic violation, and there were no circumstances making it practicable to obtain a warrant before the search. We conclude that the search complied with the constitutional requirements of the Fourth Amendment and that the trial court properly denied the suppression motion.

In reviewing a ruling on a suppression motion, we accept all factual findings by the trial court supported by substantial evidence, but exercise our independent judgment in determining whether the search was constitutional under the Fourth Amendment. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) In so doing, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) Although the prosecution has the burden of establishing the reasonableness of a warrantless search in the trial court, the appellant bears the burden of demonstrating error on appeal. (*People v. Jenkins* (2000) 22 Cal.4th 900, 972.) We will affirm the trial court's ruling if it is correct on any applicable theory of law. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

Warrantless searches are per se unreasonable pursuant to the Fourth Amendment subject to established and well-delineated exceptions. (*Arizona v. Gant* (2009) 556 U.S. 332, 338 (*Gant*).) One exception to the warrant requirement is a search incident to a lawful arrest in order to insure police officer safety and preserve evidence often found in situations where an arrest is made. (*Ibid*.) Prior to *Gant*, United States Supreme Court precedent was widely interpreted to have established a bright-line rule that automobile searches incident to an arrest of an occupant of the vehicle were constitutionally valid under most circumstances even if the arrestee did not have access to the vehicle at the time of the search. (*Id.* at p. 341; *Davis v. United States* (2011) 131 S.Ct. 2419, 2424; *People v. Evans* (2011) 200 Cal.App.4th 735, 744.) In *Gant*, the Supreme Court rejected this broad interpretation of prior authority. (*Gant*, at pp. 343-

345.) The court adopted a "new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'" (*Davis*, at p. 2425, citing *Gant*, at pp. 343–344.) Where neither of these requirements is present, "a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." (*Gant*, at p. 351.)

One established exception to the warrant requirement reaffirmed in *Gant* is the "automobile exception" which derives from the reduced expectation of privacy in a vehicle and historical distinctions between searches of automobiles and dwellings. (*Gant, supra,* 556 U.S. at p. 345; *People v. Evans, supra,* 200 Cal.App.4th at p. 753.) Under the exception, police with probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found. (*Gant*, at p. 347; *United States v. Ross* (1982) 456 U.S. 798, 825; see also *People v. Panah* (2005) 35 Cal.4th 395, 469; *Evans*, at p. 753.) Probable cause exists when the known facts and circumstances are sufficient to warrant a reasonable person to believe there is a reasonable probability that contraband or evidence of a crime will be found. (*Ornelas v. United States* (1996) 517 U.S. 690, 696; *Alabama v. White* (1990) 496 U.S. 325, 329-330.) Such a search of a lawfully stopped vehicle is not limited to evidence of the offense of arrest, and may extend to "every part of the vehicle and its contents that may conceal the object of the search." (*Ross,* at p. 825; *Gant,* at p. 347.)

Here, neither of the two prongs of the *Gant* test is present because the handcuffed Gutierrez did not have access to the vehicle at the time of the search, and there is no evidence to suggest that the vehicle contained evidence relating to the traffic violation. Several additional circumstances, however, gave the police officers probable cause to search the vehicle under the automobile exception to the warrant requirement.

The evidence established that Gutierrez continued driving for several seconds after he had become aware that the police required him to pull over and stop and

had opportunities to safely stop. During that time, Officer Higareda saw Gutierrez act furtively in a manner consistent with an attempt to hide something. This evasive and furtive behavior continued after Gutierrez had pulled over and ignored multiple police orders to get out of the car. The area where Gutierrez was driving was also a high narcotics area.

In addition, after Gutierrez got out of his car but before the actual search began, Officer Higareda saw a "crazy glue container" between the driver's seat and center console in the car. Based on his police experience, Higareda knew that glue containers were often used to conceal narcotics. Although Gutierrez was stopped for a traffic violation, his behavior at the time of the stop together with the presence of a suspicious glue container in plain view significantly altered the situation and gave officers a reasonable belief that there may have been narcotics in the glue container and elsewhere in the vehicle. The circumstances established probable cause to search the vehicle for narcotics-related contraband. Higareda opened the glue container, saw that it contained pills rather than glue, and opened the leather bag found on the floor of the vehicle which contained a substance resembling methamphetamine.

Furthermore, a police officer's observation of an item already in plain view does not implicate an individual's reasonable expectation of privacy. (*Horton v. California* (1990) 496 U.S. 128, 133.) Such conduct does not constitute a search. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.) If the item's incriminating character is immediately apparent to an officer in a lawful position to observe and access the item, the plain view doctrine allows the warrantless seizure of the item as evidence of a crime. (*Horton*, at pp. 136–137.) Although the doctrine does not apply when the incriminating character of an object is not immediately apparent, the evidence in this case created a sufficiently strong suspicion for Officer Higareda to open the glue container without violating constitutional principles. (See *id*. at pp. 135–137; *People v. Lomax* (2010) 49 Cal.4th 530, 564.)

Gutierrez relies upon *People v. Superior Court* (1970) 3 Cal.3d 807 (*Kiefer*), to support his argument that furtive gestures and similar conduct prior to

stopping are insufficient to justify a search. In *Kiefer*, an officer pulled a car over for speeding and, based on furtive gestures, conducted a search. (*Id.* at pp. 811-812.) Our Supreme Court held the search was unlawful. (*Id.* at p. 828.) The court acknowledged that movements suggesting concealment may show consciousness of guilt, but emphasized the "potential for misunderstanding" ambiguous gestures. (*Id.* at pp. 817–818.) We agree that nervous, evasive or furtive behavior standing alone may be insufficient to establish probable cause, but there were several suspicious factors in the instant case which, considered together, distinguish the case from *Kiefer*.

Gutierrez also cites cases in which different, and arguably stronger, evidence was held to establish probable cause. The fact that stronger evidence may have been present in other cases does not negate the existence of probable cause in this case. "'[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" (*Maryland v. Pringle* (2003) 540 U.S. 366, 370–371; *People v. Hunter* (2005) 133 Cal.App.4th 371, 378.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Joseph Brandolino, Judge

Superior Court County of Los Angeles

David Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

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